Affin Bank Bhd v Chia Lak Bah @ Chia Song Yong & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–357 OF 2006
JEFFREY TAN J
23 SEPTEMBER 2008

Land Law — Sale of land — Order for — Cause to contrary — Whether proved — Whether there had been effective service of notice in Form 16E on second defendant — Whether notice in Form 16E was bad and whether notice in Form 16D was appropriate

The defendants had charged their land in Johor ('the land') to the plaintiff bank as security for overdraft and trade line facilities. When the defendants defaulted in their repayments the plaintiff bank caused a notice in Form 16E to be served on the defendants demanding repayment of the outstanding sum together with interest. When the defendants failed to comply with the notice the plaintiff initiated this application for an order for sale of the land. The defendants opposed this application on the grounds that the purported notice in Form 16E was not effectively served on the second defendant because it was not received by her. At the beginning of the trial both parties agreed that the sole issue was whether the Form 16E was served on the second defendant. To this end the plaintiff adduced evidence to show proof of posting the Form 16E by registered post and asserted that if the defendants had not received the same the AR card would have been returned to the plaintiff bank. The second defendant stated that she had not received the Form 16E because she had moved from the address she had provided to the plaintiff. However, evidence showed that the notice was posted to the address as stated in the charge document, as agreed between the parties. The trial was thereafter adjourned for an up to date statement of account to be filed by the plaintiff and for the defendant to settle. At the resumed hearing the defendants submitted that the plaintiff had not proceeded by way of the appropriate notice of demand in their notice to the defendants ie that the correct form to have been served on the defendants was Form 16D and not Form 16E. The defendants submitted that since the credit facility was an overdraft and not a term loan Form 16D would be the correct form to be used. The court had therefore to consider whether the notice in Form 16E was bad and whether a notice in Form 16D was the appropriate notice to have been issued by the plaintiff in this case.

Held, allowing the plaintiff's appeal:

(1) Clause 11.02 of the charge document had provided that any demand 'shall be deemed to have been sufficiently served on the second defendant if it is left at the address stated in the charge'. This was already more than sufficient to find the disputed fact in favour of the plaintiff. Further, the plaintiff had independent proof of service of the Form 16E, to clearly establish that the said Form 16E had been served on the second defendant (see para 5).

(2) In the instant case it was futile to insist on the notice to be by way of a Form 16D. The defendants had covenanted that on demand of the plaintiff they shall pay all sums due under the overdraft and trade line facilities. Hence, Form 16E was the appropriate form and when the outstanding sum was not paid within a month of the date on which the Form 16E was served, the plaintiff was entitled to apply for an order of sale and there was no cause to the contrary (see para 15).

[Bahasa Malaysia summary

Defendan-defendan telah menggadaikan tanah mereka di Johor ('tanah') kepada bank plaintif sebagai jaminan kepada overdraf dan kemudahan dagangan. Apabila defendan-defendan mungkir di dalam pembayaran balik bank defendan mengeluarkan satu notis di dalam Borang 16E untuk disampaikan kepada defendan-defendan menuntut bayaran balik jumlah tertunggak bersama-sama dengan faedah. Apabila defendan-defendan gagal untuk mematuhi notis tersebut plaintif memulakan permohonan ini untuk satu perintah jualan tanah tersebut. Defendan-defendan membantah permohonan ini atas alasan bahawa notis yang dimaksudkan di dalam Borang 16E adalah tidak secara efektif disampaikan kepada defendan kedua kerana ia tidak diterima olehnya. Ketika permulaan perbicaraan, kedua-dua pihak telah bersetuju bahawa satu-satunya isu adalah sama ada Borang 16E telah disampaikan kepada defendan kedua. Setakat ini plaintif telah mengemukakan keterangan untuk menunjukkan bukti pengeposan Borang 16E tersebut melalui pos berdaftar dan menegaskan bahawa jika defendan-defendan tidak menerimanya kad AR akan dikembalikan kepada bank plaintif. Defendan kedua menyatakan bahawa dia tidak menerima Borang 16E kerana dia telah berpindah daripada alamat yang dia berikan kepada plaintif. Walau bagaimanapun, keterangan menunjukkan bahawa notis telah diposkan ke alamat seperti yang tertera di dalam dokumen gadaian, seperti yang dipersetujui di antara pihak-pihak. Perbicaraan kemudiannya ditangguhkan bagi satu penyata akaun terkini difailkan oleh plaintif dan defendan untuk penyelesaian. Ketika sambungan pendengaran defendan-defendan telah menghujahkan bahawa plaintif tidak meneruskan melalui notis tuntutan yang sesuai di dalam notis mereka kepada

defendan-defendan iaitu bahawa borang yang sebenar yang perlu disampaikan kepada defendan-defendan adalah Borang 16D dan bukannya Borang 16E. Defendan-defendan menghujahkan bahawa oleh kerana kemudahan kredit adalah overdraf dan bukannya pinjaman bersyarat, Borang 16D adalah borang yang sebenar untuk digunakan. Oleh yang demikian mahkamah perlu mempertimbangkan sama ada notis dalam Borang 16E adalah salah dan sama ada notis dalam Borang 16D adalah notis yang sesuai perlu dikeluarkan oleh plaintif di dalam kes ini.

Diputuskan, membenarkan permohonan plaintif:

(1) (1) Klausa 11.02 dokumen gadaian telah memperuntukkan bahawa apa-apa tuntutan 'mestilah dianggap sebagai disampaikan secara secukupnya kepada defendan kedua jika ia tinggal di alamat yang dinyatakan di dalam gadaian'. Ini sudah pun lebih dari cukup untuk mendapati fakta yang dipertikaikan berpihak kepada plaintif. Selanjutnya, plaintif mempunyai bukti bebas penyampaian Borang 16E, untuk secara jelasnya membuktikan bahawa Borang 16E tersebut telah disampaikan kepada defendan kedua (lihat perenggan 5).

(2) Dalam kes ini adalah sia-sia untuk mendesak supaya notis adalah melalui Borang 16D. Defendan-defendan telah berjanji bahawa apabila dituntut oleh plaintif mereka mesti membayar kesemua jumlah tertunggak di bawah overdraf dan kemudahan dagangan. Oleh itu, Borang 16E adalah borang yang sesuai dan apabila jumlah tertunggak tidak dibayar dalam tempoh sebulan dari tarikh Borang 16E disampaikan, plaintif berhak untuk memohon perintah jualan dan tiada sebab yang bertentangan (lihat perenggan 15).]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

Central Malaysian Finance v Loke Kok Lai [1975] 1 MLJ 160, HC (refd)
Jacob v Oversea-Chinese Corporation, Ipoh [1974] 2 MLJ 161, FC (refd)
Mary Michael v Malayan Banking Corporation Bhd [1971] 1 MLJ 172, FC (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124, HC (refd)

Legislation referred to

National Land Code ss 254, 255, Forms 16D, 16E

Mohd Fairuz bin Abdullah (Othman Hashim & Co) for the plaintiff.
KF Hua (KF Hua & Partners) for the second defendant.

Jeffrey Tan J:

[1] This is an application by the chargee bank (plaintiff) for an order for sale of the defendant's land held under Geran 34914 for Lot 13575 Mukim Pulai, Daerah Johor Bahru, Negeri Johor (hereinafter called the said land), pursuant to Part 16 of the National Land Code.

[2] At the outset, both parties (Mohd Fairuz bin Abdullah for the plaintiff and KF Hua for the second defendant) agreed (see p 3 of the notes of proceedings) that the only issue was whether the pertinent Form 16E was served. Both parties also agreed to settle that issue by way of oral evidence. And towards that end, two witnesses were called to the witness stand.

[3] The first witness (PW1 – Muhammad Ali bin Ishak) was a clerk of Messrs Othman Hashim & Co, Advocates & Solicitors of Johor Bahru, who testified as follows. On 17 December 2005, he posted the said Form 16E, namely encl 3 exh MAAB-4, by registered post, to the defendants at addresses 2, 4 & 6 Jalan Hulubalang Satu, Taman Ungku Tun Aminah 81300 Skudai, Johor Bahru and Lot 46, Jalan Sasa 3, Taman Denggongog, 89500 Kota Kinabalu, Sabah. The pertinent AR card was not returned, but P1 (which was produced) was the proof of posting. The defendants must have received the said Form 16E. The AR card would have been returned if the addresses of the defendants were imperfect, and or if the defendants had not received the said Form 16E.

[4] The only other witness was the second defendant who gave her address as Lot 46, Jalan Sasa 3, Taman Denggongog, 89500 Kota Kinabalu, Sabah, and who testified as follows. She had lived in Sabah for the past 11 years. She had lived at 2, 4 & 6 Jalan Hulubalang Satu, Taman Ungku Tun Aminah 81300, Skudai, Johor Bahru, but she did not live there in December 2005. She had not received exh MAAB-4. Enclosure 3 exh MAAB-2 was the charge. She provided the address stated in p 1 of the charge. Clause 11.02 of the charge annexure provided that any notice could be posted to the address stated in the charge annexure.

[5] The conspicuous fact that was made out by the evidence was that the addresses of the second defendant were indeed Lot 46, Jalan Sasa 3, Taman Denggongog, 89500 Kota Kinabalu, Sabah and 2, 4 & 6 Jalan Hulubalang Satu, Taman Ungku Tun Aminah 81300, Skudai, Johor Bahru. Consequently, there could be no question of the said Form 16E being sent to an address that was not of the second defendant. Also, there could be no issue of the said Form 16E being sent to a wrong address, as cl 11.2 of the charge annexure expressly provided that the address for service for any demand shall

be the address stated in the charge, which was 2, 4 & 6 Jalan Hulubalang Satu, Taman Ungku Tun Aminah 81300, Skudai, Johor Bahru. Given that the said cl 11.02 further provided that any demand 'shall be deemed to have been sufficiently served on the (second defendant) if it is left at the address stated in the charge', it was already more than sufficient to find the disputed fact in favour of the plaintiff. Now given further that the plaintiff had even independent proof (P1) of service of the said Form 16E, the finding must be that the said Form 16E had been served on the second defendant. However, the order for sale could not then be made, as an up to date statement of account had not been filed by the plaintiff, and there was an application by the second defendant for an adjournment of 'three months to settle' (see p 9 of the NP).

[6] But on the adjourned date, Mr Hua raised a new issue, notwithstanding the fact that it was agreed that the only issue was service of the said Form 16E. Seeing that Mr Mohd Fairuz had no objections to the new issue, the court saw no reason to curtail the hearing. Mr Hua contended that Form 16D and not 16E was the correct form, and that there must be a notice of demand which was not served on the second defendant. Mr Mohd Fairuz replied that the credit facility was an overdraft and not a term loan, and that Form 16D would not be the correct form.

[7] The case of *Central Malaysian Finance v Loke Kok Lai* [1975] 1 MLJ 160 was cited by Mr Hua to support his argument. In *Loke Kok Lai*, the facts were that the respondent had charged certain lands to the applicant as security for a loan of $1.6m together with interest thereon. By the said charge, the respondent agreed to repay on demand the balance sum. It was also agreed that in the event of default, the applicant would give the respondent notice under s 254 of the National Land Code. The respondent defaulted on his instalments, and the applicant issued a notice in Form 16E of the National Land Code demanding payment of the sum of $1,419,749.88 and a further sum for interest to the date of payment or realisation. Subsequently the applicant applied for an order for the sale of the land. One of the grounds of opposition by the respondent was that the applicant had used the wrong notice under the National Land Code. His Lordship, Hashim Yeop Sani J, as he then was, held that the applicant covenanted to proceed under s 254 of the National Land Code and could not seek to act under s 255 of the Code without first issuing a notice of default.

[8] But there was no such covenant in the instant case. Rather, the covenants were, that on demand the defendants shall pay all monies due and owing (see cl 3.02 of the charge annexure), and that 'any demand for

payment ... may be made by a notice in writing ... and shall be deemed to have been sufficiently served ... if it is left at the address here instated ...' (see cl 11.02 of the charge annexure).

[9] In fact, from the standpoint of the law, it would be difficult to argue that the wrong form was issued.

[10] In *Mary Michael v Malayan Banking Corporation Bhd* [1971] 1 MLJ 172, the facts were that the appellant charged certain lands to the respondents as security for overdraft facilities to the extent of $35,000 with interest thereon at 9.6%pa. The respondents caused a notice in Form 16D to be served on the appellant demanding payment of the sum of $35,971.09, it being the amount due together with interest thereon at 11%. The appellant failed to comply with the notice and the respondent brought an application for auction sale of the land. The appellant opposed the application on the grounds that the purported notice in Form 16D was null and void, and that the bank had no right to increase the rate of interest on the loan. The high court ordered the land to be sold by public auction but held that only interest at 9.6% could be charged on the advance. On appeal, the Federal Court held that although the principal sum was payable on demand, the chargee was also seeking to recover the interest which had become due and payable and that the notice in Form 16D was the appropriate notice. Pertinent to the instant case were the learned observations of Azmi LP, Gill and Ali FJJ, in relation to Form 16D and 16E.

[11] His Lordship, Azmi LP, enunciated that Form 16D applies to any charge, even where the principal sum is payable on demand, that Form 16E is both a demand for payment as well as a notice of default, and that a Form 16D is not required where the demand is in Form 16E.

> It is to be observed that a notice in Form 16D applies to any charge, so that is can validly be used even in the case of a charge where the principal sum is payable on demand, even though Form 16E is specially designed for this purpose. This would be particularly true of a charge where the principal sum bears interest and the chargor is in default of payment of interest as stipulated in the charge. If there is no interest payable on the principal sum it is open to the chargee to give a notice outside the provisions of the code either orally or in writing and, in the event of non-compliance with this notice, then to issue a notice in Form 16D on the ground that the chargor is in default. In other words, in the case of a charge where the principal sum is payable on demand and there is also a stipulation as regards payment of interest thereon, the chargee can apply for sale of the charged land either on the ground that the principal sum secured by the charge is payable on demand or on the ground that there has been a default in payment of interest. In either case a notice in Form 16D would be a valid notice.

A notice in Form 16E is both a notice of demand for payment as well as a notice that in default of payment within one month of the service of the notice the chargee will apply for an order of sale. This is clear from the wording of s 255(1) of the Code which says that in such a case no further notice in Form 16D is required. In other words, whereas Form 16D can be used whether or not the principal sum is payable on demand Form 16E can be used only if the principal sum is payable on demand.

In the *Eliathamby* case the charge provided for repayment of the principal sum on a specific date and for payment of interest every month on a certain date, and, in case of default in the payment of instalments due on account of interest, the whole amount then owing under the charge was to become immediately due and payable. The chargor made default. The chargee issued a notice in form 16E which is prescribed under s 255 of the National Land Code. Sharma J held quite rightly that as the principal sum secured by the charge was not payable on demand the notice in Form 16E was bad, and therefore dismissed the application for sale. In the present case, although the principal sum was payable on demand, the chargee was seeking to recover also the interest which had become due and payable, so that a notice in Form 16D was the appropriate notice. In the circumstances Raja Azlan Shah J was quite right in making the order for sale. I would therefore dismiss the first ground of appeal.

[12] His Lordship, Gill FJ, as he then was, was of the view that a court could order the payment of interest due on the principal sum, notwithstanding that the notice is in Form 16E.

Should this question come up for decision in the future, speaking for myself, I would say that it is open to a chargee to issue a notice in Form 16E in respect of the principal sum. If that sum is not paid in compliance with the notice and an order for the sale of the land is made on that ground, the court would have the power to order that any interest due on the principal sum be paid out of the proceeds of sale. Indeed s 257(1)(c) requires the court to specify the total amount due to the chargee at the date on which the order for sale is made. Of course, if the chargor pays the amount of the principal sum stipulated in Form 16E, the chargee will have to issue a further notice for the recovery of interest, in which event only a notice in Form 16D would appear to be appropriate.

[13] While His Lordship, Ali FJ, held that a chargee could choose to proceed under s 254 or s 255 of the National Land Code.

When a chargee issues a notice in Form 16D, I do not think it can possibly be objected to, as was done in this case. A chargee, entitled to ask for an order of sale under s 255 of the National Land Code to which Form 16E is applicable, is not, I believe, precluded from proceeding under s 254 of the Code if he so chooses.

(see also *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124, where Raja Azlan Shah J, as HRH then was, held that it is safer to use Form 16D).

[14] That there is no hard and fast rule as to which notice to issue was also said by His Lordship Suffian LP in *Jacob v Oversea-Chinese Corporation* [1974] 2 MLJ 161, who held that the object of the Legislature was to see that sufficient notice was given to the chargor before the chargee applied for an order of sale, and that the demand for payment of principal and interest, may be made by either form, or even 'in any other way'.

> The principal sum secured by this charge was payable by the chargor on demand within the meaning of sub-s (1) of s 255, therefore the chargee 'may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to it within one month of the date on which the notice is served, may apply forthwith for an order of sale without being required to serve a notice in Form 16D under sub-s (1) of s 254. 'The chargee did not make the demand by a notice in Form 16E. I do not however think that this invalidated the demand made here. The demand here was first made by the letter of 2 December 1971, of which the second paragraph clearly said that if the excess over the overdraft was not settled on or before 9 December 1971, the chargee will have 'no alternative but to recover the overdraft from you'. From the context, the word in italic must in my judgment mean the entire overdraft. Sub-section (1) of s 255 does not say that the chargee shall make the demand by a notice in Form 16E, so that it is open to it to make the demand in any other way, though I agree with counsel that the chargee cannot, for instance, do so by simply telephoning the chargor. If the chargee here had simply made its demand by the letter of 2 December, 1971, the demand might in my view have been defective, but here it followed it up by serving on the chargor a notice in Form 16D, which clearly set out its complaint and fairly warned the chargor that, if he failed to pay the money due, the chargee would apply for an order of sale. The language of sub-s (1) of s 255 would seem to indicate that if the chargee had made its demand by using Form 16E it need not have followed it up by also serving notice by Form 16D, but that if it did not first use Form 16E it would be all right if it used only Form 16D. The object of the legislation is to see that sufficient notice is given to the chargor before the chargee applies for an order of sale, and in my judgment here the chargee has given the chargor sufficient notice before coming to court.
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> During the course of the argument counsel for the chargee said that Form 16D was used because this was a demand for principal and interest, and that Form 16E was appropriate where there was a demand for principal only, probably because it is headed 'Demand for payment of a principal sum'. With respect I do not think it correct to say that if you demand principal and interest you use Form 16D, but if you demand principal only, you must use Form 16E. In my view, as neither s 254 nor s 255 uses the word 'interest', interest may be claimed by either form.
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> It seems to me that much of the argument as to whether Form 16D or Form 16E should be used would have been avoided if it is remembered that s 62 of the Interpretation Act No 23 of 1967 provides:
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> > Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not intended to mislead.

[15] The position is that Form 16D may be used even in the case of a charge where the principal sum is payable on demand and there is Form 16E for that purpose, and that Form 16D is not required if there is a demand under Form 16E. In the instant case, it was just futile to insist on Form 16D. The defendant covenanted that on demand of the plaintiff they shall pay all sums due under the overdraft and trade line facilities (see cl 3.01 of the charge annexure). Hence, Form 16E was the appropriate form. And when the sum in question was not paid within one month of the date on which the said Form 16E was served, which was the undoubted case, the plaintiff was entitled to apply forthwith for an order of sale. There was no cause to the contrary. There was no dispute that the outstanding amount stood at RM3,031,514.49. Accordingly, it was ordered that the said land be sold by public auction on 3 Mac 2009 to recover RM3,031,514.49 together with the claimed interest.

Plaintiff's application allowed.

Reported by K Nesan